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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 745

SAMUEL INSULL,

Petitioner,

vs.

NEW YORK WORLD-TELEGRAM CORPORATION, a corporation, ROY W. HOWARD, INDIANAPOLIS TIMES PUBLISHING COMPANY, a corporation, WALTER LECKRONE, E. W. SCRIPPS COMPANY, a corporation, LOUIS B. SELTZER, DICK THORNBURG, HERALD-POST PUBLISHING CO., a corporation, EDWARD M. POOLEY, KNOXVILLE NEWS-SENTINEL PUBLISHING COMPANY, a corporation, LOYE W. MILLER, PITTSBURG PRESS COMPANY, a corporation, WELDMAN W. FORSTER, NEW MEXICO STATE TRIBUNE COMPANY, a corporation, DAN BURROUGHS, and CHARLES T. LUCEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 30, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 273 F. 2d 166 and is printed in the appendix hereto, *infra* App. 1-11. The opinion of the District Court for the Northern District of Illinois is reported at 172 F. Supp. 615, and is also included in full in the record (R.[1] 60-100).

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1959, and since rehearing was not requested became final on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Does the due process clause of the Federal Constitution preclude the assertion of jurisdiction over non-resident defendants in a libel action arising from their circulation of newspapers in the forum state where plaintiff resides? If not, can the Court of Appeals, in a case removed from a state court, refuse to follow the established state law that authorizes jurisdiction over non-resident defendants to the fullest extent permitted by due process?

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[1] References to "R" in this petition are to the printed copies of the record used in the Court of Appeals, furnished under Rule 21(4) of the Rules of this Court. A certified copy of this record is included as a part of the certified transcript of the record furnished by the Clerk of the Court of Appeals and filed with this Court.

STATUTE INVOLVED

Section 17 of the Illinois Civil Practice Act provides in pertinent part (Ill. Rev. Stats. 1959, c. 110, §17):

"(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State;

(c) The ownership, use, or possession of any real estate situated in this State;

(d) Contracting to insure any person, property or risk located within this State at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section. * * *"

STATEMENT OF CASE

The plaintiff commenced this action for libel in the Circuit Court of Cook County, Illinois (R. 2). There were six counts in the complaint, but the only question raised in the Court of Appeals was whether the District Court had personal jurisdiction of the parties named as defendants in Counts I and IV. They are respectively the corporate publishers and individual editors of so-called "Scripps-Howard" newspapers, listed in a footnote to the opinion of the Court of Appeals, and Charles T. Lucey, the author of the syndicated article published in each of the newspapers on October 8, 1957, having a total daily circulation of about 1,600,000. (R. 5-8.) As it appeared in each of the newspapers, this article contained the following libelous statement about plaintiff and his deceased father, whose name he bears (R. 9):

> "Some of labor's entrenched leaders have been getting away with racketeering practices of a kind that sent the Samuel Insulls and Richard Whitneys to jail when big business tycoons were cut down to size in the 1930's."

Plaintiff has resided in and about Chicago, Illinois since his birth in 1900. His place of business is also in Chicago. R. 3-4.

Plaintiff sought damages for the injury done by each defendant to his good name and reputation as a result of the circulation of the foregoing article by each of said newspapers, in and about Chicago, as well as elsewhere in the country, on and after October 8, 1957 (R. 8-9).

After removing the action from the state court to the District Court for the Northern District of Illinois, Eastern Division (R. 12-13), the several Scripps-Howard defendants moved to dismiss for lack of jurisdiction over their

respective persons (R. 23-24), although each of them was personally served with summons and a copy of the complaint outside the State of Illinois in accordance with the provisions of Section 16 of the Illinois Civil Practice Act (Ill. Rev. Stats. 1959, c. 110, §16). (R. 60, 103). There is no question of the sufficiency of service.

In support of their motion, each of the defendants filed affidavits (R. 24-47), which are substantially the same and state generally that the corporate defendants are incorporated and have their respective principal places of business in states other than Illinois, that their respective newspapers are published in states other than Illinois, that no corporate defendant is licensed to do business in Illinois or has a registered agent in Illinois or maintains an office in Illinois or is listed in any Illinois telephone or business directory, that no corporate defendant employs an agent who is permanently located in Illinois or has assets or a bank account in Illinois, and that no individual defendant personally has assets or operates any business in Illinois or resides in Illinois.

However, these affidavits also state that each of the defendant publishing companies severally sends a number of copies of its newspaper into Illinois each day. Some of these copies are mailed directly to home subscribers. Others are mailed to a wholesale distributor and to newsstands, which in turn resell the papers to the public (R. 25-26, 28-29, 31, 33, 35-36, 37-38, 40, 42-43, 45). All payments by subscribers, including the wholesaler and newsstand operators, are mailed to the respective principal offices of the several publishing companies outside Illinois. In addition, it is a fair inference from paragraph 6 of each of the affidavits that each of the publishing companies employs reporters, advertising solicitors and other persons

who are from time to time or temporarily within Illinois R. 26, 29, 32, 34, 36, 38, 41, 43, 46.

Affidavits by officers, managers and proprietors of the wholesale distributor and the newsstands were also filed in support of the motion (R. 47-58). These affidavits state that the distributor and the newsstands also circulate newspapers other than those of the defendants, that the several defendants have no financial interest in or control over their enterprises, that they are independent contractors which purchase newspapers for their own accounts and receive them by mail from outside Illinois, and do not account to defendants for the proceeds of sales.

On April 8, 1959, the District Court granted the motion of the defendants to dismiss this action as to each of them for lack of jurisdiction of their respective persons. (R. 98-100; 172 F. Supp. 615). On appeal the Court of Appeals entered its judgment on December 30, 1959, affirming the judgment of the District Court. 273 F. 2d 166; App. 1-11, *infra*. No question of fact is involved.

REASONS FOR GRANTING WRIT

1. The issue involved here is the important question of Federal law which was presented to this Court in Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953), but not there decided, and which now can and should be decided by this Court: Is the circulation in the forum state of newspapers by non-resident defendants a sufficient contact to permit suit by a resident of the forum in a local court on account of a libelous article in these publications?

Since 1945, when it became clear that old concepts of "presence", "doing business" and "consent" were no longer controlling, many states have enacted statutes stating more broadly than before the extent to which their courts may reach non-residents. See, *e.g.*, Ark. Stat. Ann. § 27-340 (1947) (enacted 1947); La. Stats. Ann.—R.S. 13:3471 (5)(d) (1955) (enacted 1950); Minn. Stat. Ann. § 303.13 (Supp. 1957) (enacted 1957); N.C. Gen. Stat. § 55-145 (Supp. 1955) (enacted 1955); W. Va. Stats. (1959 Supp.) § 3083 (enacted 1957); Wis. Stat. Ann. 262.05 (1959) (Unoff. 226.05, enacted 1959). See also 15 P.S. Pa. § 2852-1011 (enacted 1951, later repealed). Compare pre-1945 statutes which were liberally interpreted after 1945: Md. Ann. Code, Art. 23, § 92(d) (1959) (enacted 1937); Vt. Stat. Ann. Tit. 12, § 855 (1957) (enacted 1937).

In many instances these statutes have received liberal interpretations designed to facilitate their avowed purposes. On the other hand, some decisions of State and Federal courts have emasculated these liberal enactments by the adoption of narrow and outdated theories of the requirements of due process. For examples of this hopelessly confused situation, compare cases sustaining jurisdiction such as: *Compania de Astral S. A.* v. *Boston*

Metals Co., 205 Md. 237, 107 A. 2d 357 (1954), cert. den., 348 U.S. 943 (1955); *Johns* v. *Bay State Abrasive Co.*, 89 F. Supp. 654 (D. Md. 1950); *Beck* v. *Spindler*, ... Minn. ....., 99 N.W. 2d 670 (1959); *Florio* v. *Powder Power Tool Corp.*, 248 F. 2d 367 (3d Cir. 1957); *Shepard* v. *Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E. 2d 704 (1959); *Painter* v. *Home Finance Co.*, 245 N.C. 576, 96 S.E. 2d 731 (1957); *Smyth* v. *Twin State Improvement Corp.*, 116 Vt. 569, 80 A. 2d 664 (1951); with such retrogressive decisions as: *Mueller* v. [redacted], *Inc.*, 172 F. Supp. 416 (D. Minn. 1959); *Putnam* v. *Triangle Pubs., Inc.*, 245 N.C. 432, 96 S.E. 2d 445 (1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills*, 239 F. 2d 502 (4th Cir. 1956). Semble: *Sonnier* v. *Time, Inc.*, 172 F. Supp. 576 (W.D. La. 1959).[2]

This Court has not as yet, to petitioner's knowledge, addressed the scope or effect of any of these statutes. Aside from its impact on Illinois law, the instant case presents a question of vital importance to the administration of these statutes as well as of future state legislation in this field. It involves the typical situation now causing most of the concern in the area of state jurisdiction over non-residents—where the non-residents do not physically come into the state to transact business, but their products (such as the newspapers in the instant case) are sold by them to residents through the facilities of the mails or of in-

[2] California has steadily expanded its jurisdiction over non-residents by liberalized interpretations of its pre-1945 "doing business" statute. Just as in Illinois, the California courts have interpreted this statute to expand jurisdiction to the limits prescribed by due process. *Cosper* v. *Smith & Wesson Arms Co.*, —— Cal. 2d ——; 346 P. 2d 409 (1959), *Florence Nightingale School of Nursing* v. *Superior Court*, 168 Cal. App. 2d 74, 335 P. 2d 240 (1959); *Gordon Armstrong Co.* v. *Superior Court*, 160 Cal. App. 2d 211, 325 P. 2d 21 (1958); *Duraladd Products Corp.* v. *Superior Court*, 134 Cal. App. 2d 226, 285 P. 2d 699 (1955).

dependent contractors, and inflict injuries upon residents. The instant case also presents the unique question of the reach of state jurisdiction in connection with multi-state torts committed against residents of the forum state.

APPLICABLE STATE LAW

Section 17 of the Illinois Civil Practice Act, effective January 1, 1956, is another state statute enacted to expand jurisdiction over non-residents. The Illinois decisions interpreting Section 17 have not as yet included any case involving a libel action by an Illinois resident against non-resident authors, editors and publishers of newspapers circulated in Illinois as well as elsewhere. However, the Illinois Supreme Court has concluded that Section 17 is intended to expand state jurisdiction over non-resident defendants to the maximum extent permitted by due process. *Nelson* v. *Miller*, 11 Ill. 2d 378, 389, 143 N.E. 2d 673, 679 (1957); *Grobark* v. *Addo Machine Co., Inc.*, 16 Ill. 2d 426, 431, 158 N.E. 2d 73, 76 (1959). The intermediate courts of review in Illinois have consistently adhered to this construction. See *Sunday* v. *Donovan*, 16 Ill. App. 2d 116, 120, 147 N.E. 2d 401, 403 (1st Dist. 1958); *Berlemann* v. *Superior Distributing Co.*, 17 Ill. App. 2d 522, 525, 151 N.E. 2d 116, 118 (4th Dist. 1958). Except for the case at bar, the Federal courts in Illinois have also accepted this clear and significant statement of policy. See *Orton* v. *Woods Oil & Gas Co.*, 249 F. 2d 198, 202 (7th Cir. 1957); *Rensing* v. *Turner Aviation Corp.*, 166 F. Supp. 790, 798 (N.D. Ill. 1958); *Haas* v. *Fancher Furniture Company*, 156

F. Supp. 564, 567 (N.D. Ill. 1957).[3] The Historical and Practice Notes to Section 17, written by the drafters of the section, are to the same effect. See Notes to Ill. Rev. Stats. 1959, c. 110, §17. The commentators on Section 17 have unanimously come to the same conclusion. Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 N.U.L. Rev. 599 (1955); Comment, 53 N.U.L. Rev. 79 (1958).

Accordingly, Section 17 authorizes state jurisdiction over non-residents whenever due process requirements of minimum contact and relation between the non-residents and the forum state are satisfied, in accordance with the principles announced by this Court in *International Shoe Company* v. *State of Washington*, 326 U.S. 310 (1945), and further developed in *Travelers Health Association* v. *Virginia*, 339 U.S. 643 (1950), and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957). In these decisions, this Court discarded earlier standards of due process, based upon the fictions of "presence", "consent" and "doing business", and announced that:

> ". . . . whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause

[3] At this point we mention that the Court of Appeals for the 7th Circuit in *A B Electrolux* v. *National Gas Appliance Corporation*, 270 F. 2d 472, sustained jurisdiction of a foreign corporation under Section 17(1)(a) of Illinois Civil Practice Act on finding the necessary minimum contact to satisfy due process and this Court in current No. 523 on February 23, 1960, denied certiorari. In the instant case, the same Court of Appeals found the necessary minimum contact was not present even though respondents admittedly mailed their newspapers containing the libelous matter to regular subscribers in Illinois, a far more significant and continuing contact than existed in the *A B Electrolux* case. We submit these decisions of the Court of Appeals are in conflict and that there is by the instant case squarely presented the important question of the reach of state jurisdiction over non-residents and whether the many state statutes above mentioned are to be rendered impotent by applying obsolete tests of contact to satisfy due process.

to insure." (*International Shoe Co.* v. *Washington, supra,* 326 U.S. 310, 319).

This Court further announced in those cases that:

> ". . . . the exercise of [the privilege of conducting activities within a state] may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue" (*ibid.*),

and that:

> "Looking back over this long history of litigation a trend is clearly discernible toward expending the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (*McGee* v. *International Life Insurance Company,* 355 U.S. 220, 222-223 [1957]).

Exercise of state jurisdiction over non-residents will thus be upheld if there are some contacts, ties, or relations between the non-residents and the forum state which "make it reasonable in the context of our federal system of government, to require a corporation to defend a particular suit which is brought there." *International Shoe Co.* v. *Washington, supra,* 326 U.S. 310, 316-317. The *Travelers Health Association* and the *McGee* cases further held that the conduct of business by mail across state lines is a sufficient contact or relation with the forum state if the claim asserted is related thereto.

It is apparent, therefore, that the application of state law in the case at bar required the Court of Appeals to adhere to the foregoing decisions and to determine whether the circulation of a libelous article in the circumstances of this case is a contact or relation sufficient for due process purposes. If this circulation is sufficient, then by either subparagraphs (a) or (b) of Section 17(1), Illinois must be held to have asserted jurisdiction in behalf of its residents in this and like cases.

THE COURT OF APPEALS DECISION

The Court of Appeals has decided that the circulation of the libelous article by the respective defendants in Illinois is not a sufficient contact or relation with Illinois.

In determining that the District Court did not have jurisdiction by virtue of Section 17(1)(a), the transaction of any business provision, the Court of Appeals stated (273 F. 2d at p. 170) that it had "already passed on a similar question in *Schmidt* v. *Esquire, Inc.*, 210 F. 2d 908, cert. den. 348 U.S. 819 . . .", in which it held that a non-resident corporation could not be sued in an Indiana court on the basis of the circulation in Indiana of an article libeling the plaintiff. The Court said in the *Schmidt* case (210 F. 2d at p. 916):

> "* * * we do not think it necessary to decide whether the Indiana statute is as broad as the *International Shoe* doctrine would permit. Whether the question is one of due process, or state law, we think the District Court correctly decided the question on the principles announced in *Cannon* v. *Time, Inc.*"

"The principles announced in *Cannon* v. *Time, Inc.*" [115 F. 2d 423 (4th Cir. 1940)], referred to by the Court in the *Schmidt* case, were the fictions of "presence" and "doing

business" discarded by this Court in the *International Shoe Company* case, *supra*, 326 U.S. 310.

The gist of the opinion with respect to Section 17(1)(b), the commission of a tortious act provision, is the statement (273 F. 2d at p. 171) that plaintiff sought to reach the defendants "upon the same facts which we found inadequate" as to the transaction of any business provision. Thus, according to the Court of Appeals, if there was an insufficient contact for due process purposes, it makes no difference what provision of Section 17 is relied upon. No doubt this is a proper ruling, provided the premise of absence of minimum contact is sound.[4]

It is not the purpose of this petition to consider whether the *Schmidt* case was rightly or wrongly decided. The point is there can be no doubt but that by applying the *Schmidt* case to the instant case, the Court of Appeals held there was a lack of sufficient contact or relation for due process purposes. Thus, the controlling issue determined by the Court of Appeals, and which should be reviewed and settled by this Court, is whether or not due process precludes jurisdiction in the instant and like cases.

This Court has already indicated its interest in this question. In *Polizzi* v. *Cowles Magazines, Inc.*, 345 U.S. 663 (1953), this Court granted certiorari in a case remarkably similar to the instant case—another libel action against a non-resident publishing company, in which the defendant's activities were substantially the same as those

[4] There is mention in this portion of the opinion of the "single publication rule", but since the Court of Appeals found there was no minimum contact in the circumstances, its discussion of this rule was superfluous. In any event, this rule has no bearing on the due process question. See footnote 8 below pp. 16-17.

of defendants here,[5] and which after removal from the state court, was dismissed by the lower Federal courts. The dismissal of the action was reversed by this Court because erroneously predicated upon a venue statute which this Court held to be inapplicable in removed actions. The case was remanded for decision on the jurisdictional question. It is significant that, of the seven Justices who considered the case, two thought that the exercise of jurisdiction would clearly be proper and that remand was unnecessary. None of the other Justices stated that the exercise of jurisdiction would be improper.

In the case at bar, the distribution of the newspapers containing the libel was severally caused by the defendant for business reasons too obvious to dwell upon.[6] The papers could have been withheld from the Illinois market were there any concern about libel actions by Illinois residents in Illinois courts. Defendants purposely and voluntarily chose to send the libel into Illinois, the area where it was most likely to produce substantial injury to plaintiff. Plaintiff's claims against the several defendants arose from these activities, and the damages were

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[5] In addition to circulating the libel in Florida, the plaintiff's home state, defendant Cowles Magazines also had a circulation promoter who worked in a multi-state district including Florida. However, as noted above, it is a fair inference from the affidavits of the Scripps-Howard defendants in the instant case that each of the publishers employs reporters, advertising solicitors or other agents who are in Illinois from time to time or temporarily.

[6] The author and the several newspaper editors are each also responsible for this distribution, just as the publishing companies. Generally, every person in any way responsible for the preparation and publication of a libel is a proper party defendant. 33 Am. Jur., Libel & Slander, § 196; 33 I.L.P., Slander & Libel, § 83; *Strader* v. *Snyder*, 67 Ill. 404 (1873); *Danville Press Co.* v. *Harrison*, 99 Ill. App. 244 (3rd Dist. 1901); *Storey* v. *Wallace*, 60 Ill. 51, 58 (1871); *People* v. *Fuller*, 238 Ill. 116, 87 N.E. 336 (1909).

compounded by the fact that the same activities also occurred elsewhere. In spite of the relation between Illinois and the defendants' circulation of the libelous article in Illinois, the Court of Appeals would insulate them from suit in the forum state in every case where they are not physically present there. This Court should repudiate such a throwback to pre-*International Shoe* standards and hold that whether the non-residents are physically present in the forum when the libel is circulated is not the determining factor and that the circulation of the libel is itself a sufficient minimum contact when, as here, voluntarily done by the defendants.[7]

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[7] Compare *Schmidt* v. *Esquire Inc., supra*, 210 F. 2d 908, where an independent contractor purchased the magazines outside the forum and brought them into the state for circulation. In the case at bar, the defendants mailed the newspapers to home subscribers as well as to distributors, all of whom were in Illinois when the newspapers were received. Also compare *Hanson* v. *Denckla*, 357 U.S. 235 (1958), where this Court held that due process requirements were not satisfied where the only alleged contact was the unilateral activities of the plaintiff, and the non-resident defendant had done nothing having any relation with the forum state. *Grobark* v. *Addo Machine Co., Inc.*, 16 Ill. 2d 426, 158 N.E. 2d 73 (1959), relied upon by the Court of Appeals in the case at bar, is another instance, like *Denckla*, where the only contact asserted by the plaintiff was his own unilateral activities in the forum state.

There have been many cases where due process has been held not to preclude the exercise of state jurisdiction over non-resident defendants in product liability cases where defective goods of the defendants were shipped into the forum state to the injury of residents. See, *e.g. Gordon Armstrong Co.* v. *Superior Court*, 160 Cal. App. 2d 211, 325 P. 2d 21 (1958); *S. Howes Company* v. *W. P. Milling Company*, 277 P. 2d 655 (Okla. 1954); *Florio* v. *Powder Power Tool Corporation*, 248 F. 2d 365 (3d Cir. 1957); *Florence Nightingale School of Nursing* v. *Superior Court*, 168 Cal. App. 2d 74, 335 P. 2d 240 (1959). There is no basis for distinguishing the instant case from such cases. See also *Wanamaker* v. *Lewis*, 153 F. Supp. 195 (D. Md. 1957), and *WSAZ, Inc.* v. *Lyons*, 254 F. 2d 242 (6th Cir. 1958), in both of which non-resident broadcasting companies were held subject to suit for libel in jurisdictions in which the broadcasts were heard, in addition to the places where the broadcasts originated.

2. If the decision of the Court of Appeals was not predicated upon its conclusion that due process precluded the exercise of jurisdiction, but rather was predicated on the view that Section 17 does not reach as far as due process permits, then an important question of state law had been decided in a way which conflicts with applicable state law as construed by the Illinois Supreme Court.

What has already been said indicates that the Court of Appeals reached its conclusion upon the basis of the requirements of due process. However, in an effort to discount the important Federal question described above, respondents will no doubt contend that all the Court of Appeals did was to interpret Section 17 as not reaching to the limits of due process. Compare the opinion of the District Court. R. 79-86; 172 F. Supp. 615, 628-631.

Accepting this postulate for purposes of argument, it is at once evident that, if that is what the Court of Appeals has done, the decision is clearly in conflict with the applicable Illinois law described above that Section 17 has expanded jurisdiction over non-residents to the limits of due process. See pp. 9-11 *supra*. Such an out-and-out conflict would be reason in itself for the granting of the writ sought. This Court should resolve any such conflict between the decision of the Court of Appeals and the applicable Illinois law. The question of the scope of Section 17 is of great importance to the administration of justice by Illinois courts and by the Federal courts in diversity and removed cases arising in Illinois. The reach of Section 17 should be determined as the Illinois Supreme Court has determined it, limited only by the requirements of due process as described by this Court in the *International Shoe Company* and later cases, and not on the basis of a technical and strict interpretation hinging upon the

discarded fictions of "presence", "consent" and "doing business".[8]

However, the reliance by the Court of Appeals on *Schmidt* v. *Esquire, Inc., supra*, 210 F. 2d 908, as described above (p. 12), indicates the rationale of the decision is

[8] It is significant to note that the Court of Appeals piled technicality upon technicality in concluding that in addition to the physical absence of the defendants, not even an element of the tort of libel occurred in Illinois. To reach this result, it applied the so-called single publication rule, which has been adopted in Illinois and elsewhere to clarify statute of limitations questions in multi-state libel cases and to limit the plaintiffs in such cases to a single recovery of damages based upon total circulation in all jurisdictions in lieu of several recoveries based upon circulation within each particular jurisdiction separately. See *Winrod* v. *Time Inc.*, 334 Ill. App. 59, 78 N.E. 2d 708 (1948); *Winrod* v. *MacFadden Publications Inc.*, 187 F. 2d 180 (7th Cir. 1951), cert. den'd 342 U.S. 814; Ill. Rev. Stats., 1959, c. 126, §§ 11-15. However this principle was never intended to change or modify the traditional elements going to make up the tort of libel. The principal element of this tort is still "the publication of defamatory matter . . . " See Restatement of Torts, § 568(1), p. 159. In effect, all the rule does is to provide a single recovery as a result of the contemporaneous publication of many issues of the same libelous matter, and to start the running of the statute of limitations from the time of the earliest circulation, no matter where it occurs. The rule does not change the elements of the tort of libel, which occur wherever libelous matter is published, albeit all publications are regarded as parts of a single publication.

The single publication rule should not be permitted to determine whether or not there is a sufficient contact or relation between the non-resident defendants and Illinois in the instant case. Whether or not circulation in Illinois of a newspaper article libelling an Illinois resident is a sufficient contact and relation between the publisher of that article and Illinois should not hinge on where the libelous article was first published. Indeed, under the Court of Appeals' own rationale, had the libelous article been first circulated in Illinois, instead of in the states where the respective newspaper publishers composed and printed their newspapers, the several torts involved would have been committed in Illinois, and there could be no question but that due process was satisfied. To hold that the circulation in Illinois cannot be a minimum contact because of the earlier publication elsewhere is to make a mockery of the realistic and practical standards which this Court has announced and Illinois has adopted for determining whether a state can fairly reach non-resident defendants.

that irrespective of how Section 17 is interpreted, due process precludes jurisdiction in the circumstances of this case. For this reason we have asserted the important Federal question described above (p. 7) as the primary reason for granting the writ sought.

CONCLUSION

The writ sought should be granted so that this Court can settle an important question involving the reach of state jurisdiction in the framework of due process. The question left open in the *Polizzi* case can now be decided to clarify not only Illinois law, but also the laws of the several states seeking, as Illinois has done, realistically to preserve a remedy for its residents against non-residents to the extent permitted by due process.

The decisions of the lower Federal Courts have without justification burdened not only the plaintiff but also the administration of justice, because they compel a libeled resident of the forum state to seek his remedy, if indeed he can afford to do so, at the respective home states of the defendants. Since this plaintiff has assumed this heavy burden to preserve his interests pending disposition of his rights to maintain actions in his home state, instead of one, he now has six actions scattered about the country,[9]

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[9] There were eight actions pending until recently. Those filed against the Memphis and Knoxville papers are no longer pending. For what happened in Memphis, see the opinion of the Court of Appeals in the instant case, disposing of the motion to dismiss the appeal. (273 F. 2d 166, 167). The *Knoxville* case (*Insull* v. *Knoxville News-Sentinel, et al.*, U.S.D.C. E. Dist., Tenn. No. Div., Civ. No. 3703) was voluntarily dismissed by the plaintiff following the result in the *Memphis* case. Cases are still pending in New York (*Insull* v. *New York World Telegram Corp., et al.*, U.S.D.C., So. Dist. N.Y. Civ. No. 138-182), Washington (*Insull* v. *The Washington Daily News, Inc., et al.*, U.S.D.C., D. of C., Civ. No. 2472-58), Pittsburgh (*Insull* v. *Pittsburgh Press Co., et al.*, U.S.D.C., W. Dist.,

further clogging already over-burdened courts. Either no remedy at all or multiplicity of actions in separate defendant cases is the necessary result of the limits imposed upon state jurisdiction by the lower court's narrow and obsolete views of due process.

Petitioner prays that he be heard by this Court on the merits of the important jurisdictional question presented by this cause.

Respectfully submitted,

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(Footnote 9 continued)
Pa., Civ. No. 17332), Cleveland (*Insull* v. *The E. W. Scripps Co., et al.*, U.S.D.C., No. Dist. Ohio, E. Div., Civ. No. 34828), Cincinnati (*Insull* v. *The E. W. Scripps Co., et al.*, U.S.D.C., So. Dist. Ohio, W. Div., Civ. No. 4343), and Indianapolis (*Insull* v. *Indianapolis Times Pub. Co., et al.*, U.S.D.C., So. Dist. Ind., Indianapolis Div. Civ. No. IP 58-C-256). Actions were not commenced against the El Paso, Texas, and Albuquerque, N. M., newspaper publishers and their editors in their home states, although they are named as defendants in the instant case.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12681 SEPTEMBER TERM, 1959 SEPTEMBER SESSION, 1959

SAMUEL INSULL,
Plaintiff-appellant,
v.
NEW YORK WORLD-TELEGRAM CORPORATION, a New York corporation, et al.,
Defendants-appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 30, 1959

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Samuel Insull, herein called plaintiff, a citizen and resident of Illinois, brought an action for libel in an Illinois state court against the corporate owners and publishers of publications described as Scripps-Howard daily newspapers, and the individual editors thereof.[1] No defendant is a citizen or resident of

[1]

Corporate Defendant	Editor Defendant	Newspaper
New York World-Telegram Corporation	Roy W. Howard	The New York World-Telegram and The Sun
Memphis Publishing Company	Edward J. Meeman	The Memphis Press-Scimitar
E. W. Scripps Company	Louis B. Seltzer	The Cleveland Press
Indianapolis Times Publishing Company	Walter Leckrone	The Indianapolis Times
E. W. Scripps Company	Dick Thornburg	The Cincinnati Post
Herald-Post Publishing Company	Edward M. Pooley	The El Paso Herald-Post
Knoxville News-Sentinel Publishing Company	Loye W. Miller	The Knoxville News Sentinel
Pittsburgh Press Company	Weldman W. Forster	The Pittsburgh Press
New Mexico State Tribune Company	Dan Burroughs	The Albuquerque Tribune

Illinois. Charles T. Lucey, the author of the libelous article appearing in the Scripps-Howard newspapers published by the corporate defendants is a defendant.

Summons was served outside the state of Illinois on each defendant, together with a copy of the complaint, in accordance with § 16, ch. 110, R.S. Ill. 1957.

Defendants procured the removal of the case to the district court and then moved to dismiss the cause on the ground that the court "lacks jurisdiction over the persons" of defendants. The court granted the motion, 172 F. Supp. 615, and from an order to that effect, plaintiff appeals.

1. We have reserved our ruling on a motion by defendants to dismiss the appeal on the ground that the action herein is barred because of these facts:

In the United States District Court for the Western District of Tennessee, since the filing of the case at bar, plaintiff sued Memphis Publishing Company and the complaint and answer therein raised the same issues as were raised in this case. Upon a trial, a jury found the issues in favor of defendant, and judgment for defendant was entered, which judgment has become final.

We believe defendants mistakenly urge that this judgment is *res judicata* as to all the defendants here. The charge of libel against Memphis Publishing Company in the Tennessee suit is entirely distinct from the charge of libel by publication by the other defendants named in the complaint herein. Identity of causes of action is essential to a plea of *res judicata*: *Troxall* v. *Delaware, L. & W. R.R. Co.*, 227 U.S. 434; *Holland* v. *Forcum-James C. & L. Co.*, 154 Tenn. 174, 285 S.W. 569; *Sweeting* v. *Campbell*, 2 Ill. 2d 491, 496-7.

Nor can defendants' motion be sustained on the doctrine of estoppel by finding or verdict. A former judgment does not operate as an estoppel by verdict in a second action except where it is clear from the record that a specific material and controlling fact common to both cases was litigated and determined in the first case. *Chicago Theological Seminary* v. *People*, 189 Ill. 439, 443-444; *People* v. *Wyanet Elec. Light Co.*, 306 Ill. 377, 383; *Hoffman* v. *Hoffman*, 330 Ill. 413, 418; *Prudential Ins. Co.* v. *Zorger*, 86 F. 2d 446; *Harris* v. *Mason*, 120 Tenn. 668, 115 S.W. 1146. The rule is well stated in the *Wyanet Elec. Light Co.* case, where the court said at page 383:

> "It is absolutely necessary in order that a former judgment should operate as an estoppel by verdict that there shall have been a finding of a specific fact in such former judgment or record that is material and controlling in that case and also material and controlling in the pending case. It must also conclusively appear that the matter of fact was so in issue that it was necessarily determined by the court rendering the judgment interposed as a bar by reason of such estoppel. If there is any uncertainty on this point by reason of the fact that more than one distinct issue of fact is presented to the court the estoppel will not be applied, and for the reason that the court may have decided it upon one of the other issues of fact."

There is nothing properly before this court which shows what fact was found which resulted in the verdict against plaintiff in the *Memphis* case. Indeed, the verdict of the jury might have been based on a finding that plaintiff had not proven that he had a general reputation in the Memphis area or that he had not proven that his reputation was damaged by the Memphis publication. The jury could have concluded that the article referred to plaintiff but that their verdict should be for defendant because plaintiff did not prove he was damaged by the Memphis article.

We see no impelling reason for dismissing this appeal and the motion of defendants is denied.

2. Plaintiff bases his claim that the district court had jurisdiction of defendants on section 17 of the Illinois Civil Practice Act, § 17, ch. 110, R. S. Ill. 1957, which reads:

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this State;
>
> (b) The commission of a tortious act within this State; • • •
>
> "(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.
>
> "(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section. • • •"

If plaintiff is correct in his claim as to the meaning and application of § 17 to this case, it is undisputed that service of summons on defendants was made in compliance with § 16 (1) and (2) of said Act.

The controlling facts appear in affidavits in the district court:

The corporate defendants are incorporated and have their principal places of business in states other than Illinois. Their respective newspapers are published in states

other than Illinois. No corporate defendant is licensed to do business in Illinois or has a registered agent in Illinois or maintains an office in Illinois or is listed in any Illinois telephone or business directory. No corporate defendant employs an agent who is permanently located in Illinois or maintains assets or has a bank account in Illinois. No individual defendant personally owns or operates any business in Illinois and none resides in Illinois.

Each of the defendant companies sends a number of copies of its respective newspaper into Illinois each day. Some of these copies are mailed directly to subscribers, and others are sold to the Illinois public through a wholesale distributor and from newsstands. All payments by subscribers, wholesalers and newsstand operators are mailed to the respective principal offices of the several publishing companies outside Illinois. The distributors also circulate newspapers other than those of defendants, the several defendants have no financial interest in or control over the formers' enterprises, they are independent contractors which purchase newspapers for their own accounts, receive them by mail from outside Illinois, and do not account to defendants for the proceeds of sales. Each corporate defendant publishes a newspaper from without the state of Illinois; all defendants' printing occurs outside Illinois; each defendant first distributes its particular newspaper without Illinois and within the city of printing; distribution elsewhere than in the city of printing is always made *subsequent* to distribution in the city of printing; payment to the defendants for papers shipped and any orders that might be received for papers are all transmitted to defendants' principal offices for receipt and acceptance; no collections or subscription activities whatsoever are carried on by any of the corporate defendants within Illinois; the corporate defendants' newspapers are circulated in

Illinois only by independent news vendors, independent wholesalers, and mailings from without state; no circulation whatsoever is made within the state by any of the defendants. The extent of the defendants' newspapers' circulation in Illinois is summarized thus: average number of defendants' newspapers mailed daily to Illinois subscribers from without the state: New York World-Telegram and The Sun 37; Memphis Press-Scimitar 35; The Indianapolis Times 25; Cleveland Press 29; Cincinnati Post 23; El Paso Herald-Post 6; Knoxville News-Sentinel 18; The Pittsburgh Press 29; The Albuquerque Tribune 8.

Average number of defendants' newspapers mailed daily to independent newsdealers in Illinois from without the state:

New York World-Telegram and The Sun	2
Memphis Press-Scimitar	1
The Indianapolis Times	4.5
Cleveland Press	4
Cincinnati Press	4
El Paso Herald-Post	1
Knoxville News Sentinel	1.3
The Pittsburgh Press	8
The Albuquerque Tribune	1

Average number of defendants' newspapers mailed daily to an independent wholesaler in Illinois from without the state:

New York World-Telegram and The Sun	19

None of the corporations employs or has any reporters, advertising solicitors or other persons who are located in Illinois; none of the corporations owns or maintains any assets (either realty or personalty) in Illinois; none of the corporations has a bank account in Illinois.

Upon the foregoing facts, plaintiff contends that defendants—

> are within the reach of "the transaction of any business" provisions of § 17 (1) (a). For an indefinite period of time each has sold its newspapers to the Illinois public by subscription or through distributors or newstands which are themselves subscribers. Indeed, it is fair to infer from the affidavits of the publishing companies that there is a continuing relationship between them and their respective subscribers, which is no doubt based upon subscription agreements. In any event, the several defendants know and intend that their papers will reach the Illinois public. This day-to-day entrance into the Illinois market produced the circulation of the libelous article in Illinois, to the substantial injury of plaintiff. The subscribers were those to whom the libel was first published in this state.
>
> The obvious significance of these contacts cannot be minimized on the theory that none of the defendants or their agents physically entered Illinois.
>
> • • •
>
> The statutory requirement is not that defendants be "present" in Illinois or even that they "do business" here in the general sense. It is sufficient if, by whatever means, they transact "*any* business" in the State.
>
> To conclude that the defendants transact no business in this state is to ignore reality. • • •

After citing *McGee* v. *International Life Ins. Co.*, 355 U.S. 220; *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643; *Wanamaker* v. *Lewis*, 153 F. Supp. 195; *WSAZ, Inc.* v. *Lyons*, 254 F. 2d 242; and *French* v. *Gibbs Corp.*, 189 F. 2d 787, plaintiff asserts that—

> defendants in the case at bar transact sufficient business in this state that it is not unfair to subject them to suit here. Their physical presence in Illinois is not required as a prerequisite to this result, and even if it is, each of them is "present" here by virtue of the use of the mails as the agency whereby their news-

papers are delivered in this state. Since they have so conducted this phase of their businesses, they cannot hide behind the fact that deliveries are made by the Post Office. The Post Office may properly be regarded, as it was by Judge Hand, as the agent of each of the defendants.

The question which arises under § 17 (1) (a) is whether the facts reveal that defendants transacted any business within the state of Illinois. We have already passed on a similar question in *Schmidt* v. *Esquire, Inc.*, 210 F. 2d 908, cert, den. 348 U.S. 819. We said, at 916:

"• • • Esquire, Inc., is a corporation foreign to the State of Indiana and is not licensed nor admitted to do business there. It publishes the Esquire and Coronet magazines, which are available in Indiana either through subscription or at the newsstand. These magazines are printed in Chicago and are mailed directly from there to Indiana subscribers. They are placed on newsstands in Indiana by the Curtis Circulation Company, an independent corporation which purchases the magazines from Esquire and effects distribution through independent wholesale organizations. Esquire has no office of any kind in Indiana, and it has no employees or agents there to gather material for publication, nor to solicit advertising, subscriptions or newsstand sales.

"Under these facts, we do not see how it can seriously be contended that Esquire was amenable to suit in Indiana. • • • Obviously, the necessary contacts with the state are absent here."

We adhere to our ruling in that case.

Our interpretation of § 17 (1) (a) is consistent with the holding in *Grobark* v. *Addo Machine Co., Inc.*, 16 Ill. 2d 426, 158 N.E. 2d 73.

Among the many cases which are authority for the proposition that a foreign publishing corporation is not transacting business in a state because it ships its periodicals

into the state to subscribers or to independent contractors for resale, are the following: *Street & Smith Publications, Inc.* v. *Spikes*, 120 F. 2d 895, 897-98, cert. denied 314 U.S. 653; *Deighan* v. *Beverage Retailer Weekly & Trade Newspaper Corp.*, 18 N. J. Misc. 705, 16 A. 2d 612, 613-14; *Reed* v. *Real Detective Pub. Co.*, 63 Ariz. 294; 162 P. 2d 133, 139-40; *Whitaker* v. *MacFadden Publications, Inc.*, 105 F. 2d 44, 44-45; *Cannon* v. *Time, Inc.*, 115 F. 2d 423, 425-26; *Putnam* v. *Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E. 2d 445, 450-54.

Moreover, there is no legal basis for holding the editor defendants personally liable on the theory that they transacted any business in Illinois. Plaintiff does not even suggest a basis for such a holding.

On the other hand, our recent case of *National Gas Appliance Corp.* v. *AB Electrolux*, 270 F. 2d 472, affords an example of what amounts to "the transaction of any business within this State."

3. Also relying on this language in § 17 (1) (b): "The commission of a tortious act within this State", plaintiff maintains that the—

> "several defendants published the libelous article in Illinois by virtue of the sales by them of their respective newspapers to their respective Illinois subscribers, including the wholesalers and newsstands. We need not be concerned at this time with what those subscribers did with the newspapers after they received them in the mails, since upon receipt in Illinois, the several libels were complete so far as this state is concerned. Therefore, while it is true that not all of the tortious acts complained of occurred in Illinois, since publication of each newspaper also occurred elsewhere, this state is nevertheless the situs of a significant portion and, moreoveer, is the most significant situs of injury in view of plaintiff's residence here.

Upon the same facts which we have found inadequate to prove defendants transacted any business within Illinois, plaintiff now asks us to hold that all of the defendants committed a tortious act there.[2] None of the defendants either personally or through an agent was present in Illinois. Cf. *Nelson* v. *Miller*, 11 Ill. 2d 378, 393, 143 N.E. 2d 673, 681.

Plaintiff argues that "each publication of the Lucey article is a separate tort and the subject of a separate cause of action" and also that "it is well settled that the place of wrong, or the place where the last event necessary to make the defendant liable in tort occurs, is 'where the defamatory statement is communicated', and not the place 'from which the offending material is sent or where it originates.'" He adds that the "several torts were nonetheless committed when the newspapers were received in Illinois after having been mailed by the defendants."

In substance, plaintiff argues that the appearance of defendants' papers in Illinois is the "last event necessary to make the defendant liable in tort". That this is a mistaken conclusion is established by Illinois law. In *Winrod* v. *Time, Inc.*, 334 Ill. App. 59, 65-72, 78 N.E. 2d 708, 710-14, leave to appeal denied 336 Ill. App. xiv, it was held that in cases of multi-state circulation of periodicals the cause of action for libel is absolutely complete at the time of first publication; subsequent appearances or distributions of the periodicals are of no consequence whatsoever to the creation or existence of the cause of action but are only relevant in computing damages.[3] To the same effect was our holding in *Winrod* v. *MacFadden Publication, Inc.*, 187 F. 2d 180, 182, cert. denied 342 U.S. 814.

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[2] *Cf. Putnam* v. *Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E. 2d 445, 454.

[3] On oral argument *Winrod* v. *Time, Inc.* was said to be limited to the defense of the statute of limitations. An inspection of that decision reveals that the rationale of that case is directed at a multiplicity of suits, as well as suits barred by the statute of limitations.

It follows that the facts in this record show no tortious act committed within Illinois and hence jurisdiction under § 17 (1) (b) could not attach. Of course, plaintiff would have had a right to sue in the states where the libel was published, a right of which he took advantage when he sued one of the defendants herein in the federal district court at Memphis, Tennessee as hereinbefore referred to.

For the reasons stated, the judgment of the district court is affirmed.

Affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 745

SAMUEL INSULL,

Petitioner,

vs.

NEW YORK WORLD-TELEGRAM CORPORATION, a corporation, ROY W. HOWARD, MEMPHIS PUBLISHING COMPANY, a corporation, EDWARD J. MEEMAN, INDIANAPOLIS TIMES PUBLISHING COMPANY, a corporation, WALTER LECKRONE, E. W. SCRIPPS COMPANY, a corporation, LOUIS B. SELTZER, DICK THORNBURG, HERALD-POST PUBLISHING CO., a corporation, EDWARD M. POOLEY, KNOXVILLE NEWS-SENTINEL PUBLISHING COMPANY, a corporation, LOYE W. MILLER, PITTSBURGH PRESS COMPANY, a corporation, WELDMAN W. FORSTER, NEW MEXICO STATE TRIBUNE COMPANY, a corporation, DAN BURROUGHS, and CHARLES T. LUCEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BYRON-WARREN PRINTING COMPANY, CHICAGO

IN THE

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SAMUEL INSULL,

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NEW YORK WORLD-TELEGRAM CORPORATION, a corporation, ROY W. HOWARD, MEMPHIS PUBLISHING COMPANY, a corporation, EDWARD J. MEEMAN, INDIANAPOLIS TIMES PUBLISHING COMPANY, a corporation, WALTER LECKRONE, E. W. SCRIPPS COMPANY, a corporation, LOUIS B. SELTZER, DICK THORNBURG, HERALD-POST PUBLISHING CO., a corporation, EDWARD M. POOLEY, KNOXVILLE NEWS-SENTINEL PUBLISHING COMPANY, a corporation, LOYE W. MILLER, PITTSBURGH PRESS COMPANY, a corporation, WELDMAN W. FORSTER, NEW MEXICO STATE TRIBUNE COMPANY, a corporation, DAN BURROUGHS, and CHARLES T. LUCEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents pray that the writ of certiorari be denied.

QUESTIONS PRESENTED.

Respondents, in contrast to petitioner, believe the following questions are presented:

1. Is the question of service of process pursuant to Section 17 of the Illinois Civil Practice Act moot because an adverse judgment had previously been en-

tered against petitioner and in favor of one of the respondents in a separate suit involving the identical cause of action pleaded here?[1]

2. Did the Court of Appeals correctly follow the Illinois law in its holding that Section 17 of the Illinois Civil Practice Act does not, upon the instant record, authorize service of process upon respondents?

STATEMENT OF CASE.

We accept petitioner's statement as being accurate with one exception. Petitioner asserts (Petition, pp. 5-6): "In addition, it is a fair inference from paragraph 6 of each of the affidavits that each of the publishing companies employs reporters, advertising solicitors and other persons who are from time to time or temporarily within Illinois. R. 26, 29, 32, 34, 36, 38, 41, 43, 46." We do not believe the nine respondents' affidavits filed with the District Court can be so read and the opinion of the Court of Appeals did not so construe these affidavits.

REASONS FOR DENYING THE WRIT.

We oppose the granting of a writ of certiorari. No federal question whatsoever was adjudicated below; the lower court decided the question of service solely upon a correct application of the controlling Illinois law. Moreover, the posture of this case and the present status of Illinois law make it plain that the question petitioner seeks to bring here is premature. Accordingly, for several equally compelling reasons, the case is inappropriate for review by the Court.

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1. The opinion of the Court of Appeals shows this question was fully litigated below. We believe the issue to be intermeshed with the case and thus was necessarily brought here by petitioner. *Langnes* v. *Green*, 282 U. S. 531, 532-539 (1930); *Walling* v. *General Industries Co.*, 330 U. S. 545, 547 (1947).

Petitioner's contention that the Court should review this case because the lower court invalidated service for due process considerations is, we submit, clear error. The briefs below show that the only question of service the parties there presented was the construction of Section 17 of the Illinois Civil Practice Act;[2] the holding of the Court of Appeals stays strictly within this ambit. And since the lower court's opinion does not invalidate Section 17 it is beyond peradventure that no due process determination was ever made by that court. A due process question would only have been reached if the lower court had construed the statute to permit service. The court would then, and then alone, have been required to determine whether a state statute that sanctioned such service could be valid when mirrored against the due process clause. *Rosenthal* v. *Frankfort Distillers,* 193 F. 2d 137, 141 (5th Cir., 1951).[3]

Petitioner also contends that he has basis for seeking the writ because the decision below was not decided in accordance with applicable state law. This claim is likewise not sustainable. The District Court in Illinois and then the Court of Appeals found that the service in question was not supportable either under the "doing business" or the "commission of tort" provisions of Section 17 of the Illinois Practice Act. The holdings as to the lack of a "doing business" basis for jurisdiction are signally sup-

2. Respondents have lodged with the Clerk certified copies of the lower court briefs.

3. This Court has authoritatively defined allowable due process limits as to personal jurisdiction only when a lower court has asserted such jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714 (1877); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Travelers Health Ass'n* v. *Virginia*, 339 U. S. 643 (1950); *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957); *Hanson* v. *Denckla*, 357 U. S. 235 (1958). Presumably a holding defining the outer perimeter of personal jurisdiction when such jurisdiction has been denied by the state law would constitute an advisory opinion. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241 (1937).

ported by the Supreme Court of Illinois' latest utterance concerning Section 17. See *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73, *rehearing denied* (1959), cited and specifically relied upon in the opinion below. And for other cases considering Section 17 of the Illinois Practice Act and sustaining both lower courts' holdings see *Morgan* v. *Heckle*, 171 F. Supp. 482 (E. D. Ill., 1959); *Orton* v. *Woods Oil and Gas Co.*, 249 F. 2d 198 (7th Cir., 1957); and *Trippe Manufacturing Co.* v. *Spencer Gifts*, 270 F. 2d 821 (7th Cir., 1959).[4] So also, the lower courts'

4. The Illinois Supreme Court said in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 436:

"In the present case, the record shows that the defendant, Addo Machine Company, Inc., is a corporation organized conformably to the laws of the State of New York and domiciled in that State. It is not licensed to do business within the State of Illinois. It manufactures adding machines outside of Illinois and ships these machines to purchasers throughout the United States. It does not and has not at any time maintained any offices in Illinois, nor employed any officers, agents or employees, or other persons within the State. From May 19, 1953, defendant, pursuant to the letter of that date addressed to plaintiffs, began to sell its machines to plaintiffs at a distributor discount rate. The sales were consummated when plaintiffs placed orders with the defendant in New York, and defendant accepted the orders, delivering its product to independent carriers in New York. On or about July 1, 1955, defendant advised plaintiffs that beginning October 1, 1955, they would no longer be exclusive distributors of defendant's products in the Greater Chicago Trading Area, and after the latter date defendant sold its machines at a distributor level and to the individual defendants and to other distributors. Defendant did not at any time own any interest in any corporation, partnership, or individual distributing its products in Illinois, and did not at any time have the right to exercise any control over the distributors: the relationship between defendant and distributor being that of seller and purchaser. After October 1, 1955, the defendant continued to sell equipment to plaintiffs on a dealer price level until January 1, 1956, when it declined to accept any further orders from plaintiffs.

"We concur in the conclusion of the Appellate Court that plaintiffs were not doing business in Illinois as defendant's agents. They were independent businessmen in Illinois selling their own merchandise which had been manufactured by the

"commission of tort" holdings are likewise manifestly in accord with the Illinois cases on the subject. *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957); *Winrod* v. *Time, Inc.*, 334 Ill. App. 59, 78 N. E. 2d 708 (1st Dist., 1948), *leave to appeal denied* 336 Ill. App. xiv (1948); see also *Putnam* v. *Triangle Publications*, 245 N. C. 432, 96 S. E. 2d 445 (1957). Clearly, the District Court and the Court of Appeals faithfully followed and properly applied the Illinois cases concerning the meaning and scope of Section 17 of the Illinois Civil Practice Act.

Petitioner, contending at the same time that the lower courts wrongly decided the case pursuant to Illinois law, also unequivocally concedes that the question concerning the pertinence of Section 17 of the Illinois Practice Act as to out of state publishers, has never been considered by the Illinois courts (Petition, p. 9). Section 17 is relatively new legislation and as yet the Supreme Court of Illinois has had slight opportunity to interpret it. (As presented immediately above, the holdings that have been made by the Illinois courts all support and sustain the opinion below.) This Court has most recently held that when a state has not passed upon a particular question of its law the Court will not venture into the area. *The Tungus* v. *Skovgaard*, 358 U. S. 588 (1959). The Court there said (p. 595):

> "• • • Yet the fact is that the New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act. In sum, there is no way of knowing whether New Jersey would impose uniform legal standards throughout its jurisdiction, or would apply in this case rules

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defendant. They were not transacting business for the defendant in Illinois; they were transacting business for themselves." In the *Grobark* case over $150,000 worth of defendant's machines was shipped into the state (See *Trippe Manufacturing Co.* v. *Spencer Gifts*, 270 F. 2d 821, 823 (7th Cir., 1959).)

> different from those that would govern if, instead of meeting his death aboard the *Tungus*, Skovgaard had been killed on the adjacent dock. An effort to resolve that question here, no less than the effort of the Court of Appeals, could be nothing but a prediction, a prediction that might tomorrow be proved wrong by the courts of New Jersey, which alone have power to render an authoritative interpretation."

Here too, we submit, a construction of Section 17 of the Illinois Civil Practice Act should not be made by this Court until the issue of service on out-of-state publishers has first come before the Illinois Supreme Court.

The petitioner suggests the Court should hear this cause because the Illinois courts have indicated that Section 17 extends to the reaches of due process; petitioner thus argues that a decision concerning Illinois service necessarily becomes a federal question. The argument that a federal question is raised because a state uses a federal enactment or right as a statutory criterion has been rejected by the Court no less than three times. *Miller's Executors* v. *Swann*, 150 U. S. 132, 136-137 (1893); *Shoshone Manufacturing Co.* v. *Rutter*, 177 U. S. 505, 508 (1900); *Louisville & Nashville R. R.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 303 (1915). See also dissent of Holmes, *J.* in *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 213 (1921): As the Court said in *Miller's Executors* v. *Swann*, 150 U. S. 132, 136-137:

> "• • • The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the

> acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin."

Finally, we believe two considerations not noticed by the petitioner suggest certiorari should be denied. First, as the record and the opinions below disclose, respondents' circulation in Illinois is patently *de minimus;* it is apparent that Illinois is not an intended market or audience for any of the respondents' publications. We believe this Court should not consider the application of Section 17 of the Illinois Civil Practice Act to out-of-state publishers in such a context. Rather, such a determination, particularly when the Illinois courts have not spoken on the subject, better abides a case when the record contains evidence of some reasonable quantum of circulation within the state.[5]

A second, and we believe equally pertinent, reason for denying the writ is the fact that petitioner's proffered question of the construction of Section 17 should never be reached. As the record and opinion below show, during the pendency of this suit, in a separate action elsewhere and after a jury verdict, judgment was entered against the petitioner and in favor of one of the respondents. We thus moved below to dismiss the appeal and urge here, on the basis of the record of that separate proceeding, that petitioner is barred from this action; see *Bentley* v. *Teton*, 19 Ill. App. 2d 284, 153 N. E. 2d 495 (1st Dist., 1958); *Bruszewski* v. *United States*, 181 F. 2d 419 (3d Cir., 1950),

5. In *Polizzi* v. *Cowles*, 345 U. S. 663, 667 (1953), cited by petitioners, 50,000 copies of the publication in question were circulated in the state claiming jurisdiction.

cert. denied, 340 U. S. 865 (1950). Petitioner being collaterally estopped from proceeding here, the question concerning petitioner's claimed construction of Section 17 of the Illinois Civil Practice Act has become a moot inquiry. *Keely* v. *Ophir Hill Consol. Mining Co.*, 169 Fed. 601, 605 (8th Cir., 1909). We respectfully suggest that the Court would not want to reach any question concerning the interpretation of Section 17 of the Illinois Civil Practice Act or a possible due process question in such a context.

Respectfully submitted,

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March 18, 1960.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 745

SAMUEL INSULL,

Petitioner,

vs.

NEW YORK WORLD-TELEGRAM CORPORATION, a corporation, **ROY W. HOWARD, INDIANAPOLIS TIMES PUBLISHING COMPANY**, a corporation, **WALTER LECKRONE, E. W. SCRIPPS COMPANY**, a corporation, **LOUIS B. SELTZER, DICK THORNBURG, HERALD-POST PUBLISHING CO.**, a corporation, **EDWARD M. POOLEY, KNOXVILLE NEWS-SENTINEL PUBLISHING COMPANY**, a corporation, **LOYE W. MILLER, PITTSBURG PRESS COMPANY**, a corporation, **WELDMAN W. FORSTER, NEW MEXICO STATE TRIBUNE COMPANY**, a corporation, **DAN BURROUGHS**, and **CHARLES T. LUCEY,**

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The portions of respondents' brief in opposition which comment upon the alleged effect of the judgment for the defendant in the *Memphis* case (*Insull* v. *Memphis Publishing Company*) have nothing whatsoever to do with the question we seek to bring to this Court. The Court of Appeals overruled respondents' motion to dismiss the appeal and we do not understand that respondents' brief amounts to a petition for cross-writ of certiorari to review this part of the Court of Appeals' decision.

So far as pertinent to the petition for certiorari, respondents' brief includes only one point to which reply should be helpful to this Court. On pages 6-7, respondents refer to four early decisions of this Court, in support of their contention that a federal question is not involved.

Three of these cases involved whether the Federal courts had jurisdiction on the ground that the cause arose under the laws of the United States. *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 505 (1900); *Louisville & Nashville Ry. Co.* v. *Western Union Co.*, 237 U.S. 300 (1914); *Smith* v. *Kansas City Title Co.*, 255 U.S. 180 (1921). The instant case has nothing whatsoever to do with this aspect of Federal jurisdiction. It was removed to the District Court because there was diversity of citizenship and the requisite amount in controversy. The fact that the several claims do not arise under a Federal law has nothing whatsoever to do with whether the Federal question described in our petition is involved and should be decided by this Court.

The fourth case cited, *Miller's Executors* v. *Swann*, 150 U.S. 132 (1893), is similarly inapplicable. In 1856, the Congress enacted a statute which granted public lands to the State of Alabama to aid in the construction of railroads. Shortly thereafter, Alabama by statute made certain railroads the beneficiaries of the Federal grant and, by statute in 1870, gave those railroads the right to sell portions of those lands in accordance with procedure included in the 1856 Act of Congress. This case arose after one of the railroads had defaulted in its mortgage obligations to the State, and the State had foreclosed on certain of the lands and thereafter sold those lands to the defendants who then became involved in an action for ejectment. Title to the lands was the sole issue. This did not involve a Federal question since the United States had no rights whatsoever to the lands in question.

None of the cited cases can be compared with the case at bar. What is involved here is the failure to exercise jurisdiction over non-resident defendants because, according to the lower Federal courts, the due process clause forbids this. Our petition for certiorari seeks to review this erroneous determination of an important Federal question.

Respectfully submitted,

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